

AMENDED RULES ON COMPANY CHARGE

7 May 2013, the Danish Parliament passed a bill changing the rules on company charges and making them more flexible.

In this article, we look at the most important changes which affect stakeholders who often act as chargees, including banks.

The previous Rules

In 2005, new rules on company charges were implemented into the Danish Land Registration Act giving owners of a business enterprise the option to collectively mortgage a number of the business's current and future assets.

A Company charge is a "floating" charge in that certain assets, including stock, are separable from the company's regular operation, while new assets acquired by the company are automatically covered by the company charge.

Motor vehicles etc. which are or have been registered, i.e. used cars, cannot be charged as company charge, but such cars may be mortgaged according to the rules of registration in the Registry of Motor Vehicles.

Before, it was only possible to create a company charge by using letters of indemnity.

Amended Rules on creating a Company Charge

With the introduction of the new rules, a company charge may be created using a mortgage deed registered to the mortgagor.

A second mortgage on a mortgage deed registered to the mortgagor may be created for the purpose of using the framework of the mortgage deed. Such mortgaging will need to be registered in order to be secured.

Within its framework, a mortgage deed registered to the mortgagor serves as security for the claims under the charge agreement. The mortgage deed registered to the mortgagor does not, however, provide security for any amount larger than its nominal value despite mortgaging several assets. This means that the mortgage deed's nominal value frames what may be received to cover the secured claim, including any accrued interests and costs, when enforcing the mortgaged assets.

Seeing as the company charge's security is "floating", new assets will be included by the security – subject to any retentions of title etc. – on an ongoing basis as they are acquired by the chargor.

Amended Rules on Motor Vehicles secured as a Company Charge

The new rules will also enable the charging of motor vehicles which are or have been registered in the Register for Motor Vehicles or any similar foreign register, i.e. used cars, if the chargor operates a business enterprise occupied with the purchase and sale of cars.

It is a requirement that the chargor is the operator of a business enterprise engaged in the purchase and sale of motor vehicles.

The term "business enterprise engaged in the purchase and sale of motor vehicles" covers both circumstances in which the business enterprise engages solely in the purchase and sale of cars (car dealers) and circumstances in which the purchase and sale of motor vehicles are a material part of the activities of the business enterprise in question. Thus, the term will also include e.g. chargors operating a business engaged in renting, leasing etc. of cars and that, as part of this business, purchases cars for the purpose of renting or leasing them etc., including a subsequent resale of the motor vehicles in question.

Thus, the crucial factor is that the cars are a part of the company's assets intended for purchase and sale. It is of no matter whether the motor vehicles etc. have been purchased with a view to resell or whether the chargor is responsible for any manufacturing of the motor vehicles before they are resold.

Vehicles exempt from registration, e.g. if the vehicle is mostly used off public roads, can still not be included by a company charge.

If a used car dealer has charged his or her stock of used cars by using company charge, any divestiture will in principle be separation from the regular operation so that the car is left out of the company charge.

The possibility of registering a mortgage deed of the individual car into the Registry of Motor Vehicles remains, and any mortgage deed registered in the Registry of Motor Vehicles will subsist regardless of whether or not the car is firstly included by and later left out of a company charge.

Specification of preferential Position between Company Charge and individual Charge

The amended rules specify that any registered company charge must respect any chattel and motor vehicle mortgages which have been registered when the asset in question was acquired by the company chargor. A similar aspect applies in connection with a legally agreed retention of title of chattels which, on the other hand, do not need to be registered.

If a mortgage is registered on chattels or vehicles later than the company charge, the preferential position between the rights will depend on whether registration of the mortgage of the asset has taken place no later than the time at which the chargor acquired the mortgaged asset. In this event, the company charge must respect the individual mortgage. If, however, a mortgage of the individual asset is not registered at the time of the acquisition, this mortgage must respect the company chargor's preference in the asset.

Since the requirement for registration at the time of the acquisition does not apply to any retention of title in other chattels, the company charge must respect the seller's rights in the chattels provided that the retention of title has been legally agreed upon when the purchase was made.

Our Opinion

The new rules imply an increased flexibility for the company charge institution, including in connection with the creation of a company charge which may now be created both by a letter of indemnity or a mortgage deed.

However, the manner in which a company charge is created is not without importance seeing as different possibilities and limitations are attached to the individual types of deeds.

Our recommendation is that the new rules be contemplated by financial institutions and anyone else who often act as company charges, not least because the new rules also imply changes to the assets included by the company charge.

The new rules will come into force on 1 July 2013.

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